

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY

Meeting Date: March 10, 2015

Consent Regular
 Public Hearing

Department

Submitted By: COUNTY ATTORNEY

Submitted For: COUNTY ATTORNEY

I. EXECUTIVE BRIEF

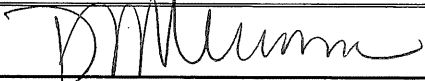
Motion and Title: Staff recommends motion to: approve an Agreement for Legal Services (Agreement) with Kaplan Kirsch and Rockwell, LLP, with a not-to-exceed amount of Three Hundred Fifty Thousand Dollars (\$350,000) for expert aviation legal services and Thirty Thousand Dollars (\$30,000) for reimbursable costs, for a total not-to-exceed amount of Three Hundred Eighty Thousand Dollars (\$380,000), with an initial term of two years with two two-year renewal options.

Summary: This Agreement provides for expert aviation legal services to be provided to the County Attorney by Kaplan, Kirsch and Rockwell, LLP on an as needed basis. The Agreement would commence on January 9, 2015, and would be limited to an amount not-to-exceed Three Hundred Fifty Thousand Dollars (\$350,000). The Agreement also provides for reimbursable costs up to Thirty Thousand Dollars (\$30,000), for a total not-to-exceed amount of Three Hundred Eighty Thousand Dollars (\$380,000). As a cost-savings measure, the Agreement provides that the County Attorney's Office will perform all routine legal services not requiring expertise in aviation law, such as drafting discovery, defending/taking depositions, and attending hearings. Countywide (ATP)

Background and Justification: On January 13, 2015, Mar-a-Lago, LLC., served Palm Beach County with a lawsuit, in a case captioned *Mar-a-Lago, LLC v. Palm Beach County, Florida*, Case No. 50 2015 CA 000086 XXXX MB AA, in the Florida Fifteenth Judicial Circuit Court. The case raises claims against Palm Beach County for trespass, nuisance, and inverse condemnation, arising from the operation of the Palm Beach International Airport, and resulting flights over Mar-a-Lago's property. Kaplan Kirsch & Rockwell is a national law firm that specializes in aviation law, including airport-related noise issues, and has successfully represented the Department of Airports in other aviation-related litigation. Kaplan Kirsch & Rockwell's expertise in aviation litigation will assist the County Attorney's Office in successfully defending the case. (continued on p.3)

Attachments:

1. Agreement between Palm Beach County and Kaplan, Kirsch and Rockwell, LLP for Legal Services
2. Budget Availability Statement

Recommended by:  2/3/15
County Attorney Date

Approved by: N/A
Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2015	2016	2017	2018	2019
Capital Expenditures	_____	_____	_____	_____	_____
Operating Costs	<u>\$380,000</u>	_____	_____	_____	_____
External Revenues	_____	_____	_____	_____	_____
Program Income (County)	_____	_____	_____	_____	_____
In-Kind Match (County)	_____	_____	_____	_____	_____
NET FISCAL IMPACT	<u>\$380,000</u>	_____	_____	_____	_____
# ADDITIONAL FTE POSITIONS (Cumulative)	_____	_____	_____	_____	_____

Is Item Included in Current Budget? Yes X No _____

Budget Account No.: Fund 4100 Department 120 Unit 1110 Object 3125
Reporting Category _____

B. Recommended Sources of Funds/Summary of Fiscal Impact:

Approval of this item authorizes a not to exceed amount of \$380,000 which is currently budgeted in the above referenced account, funded by Airport revenues.

C. Departmental Fiscal Review: _____

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Development and Control Comments:

<p><i>Susan Neary</i> 2/6/15 _____ OFMB 2/4/15</p>	<p><i>Dr. J. Jacobson</i> 2/12/15 _____ Contract Development and Control 2-12-15 <i>Whell</i></p>
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B. Legal Sufficiency:

Amy Taylor Petrace

Assistant County Attorney

C. Other Department Review:

Department Director

THIS SUMMARY IS NOT TO BE USED AS A BASIS FOR PAYMENT.

Background and Justification: (continued from p. 1) The present case is similar to prior litigation between Donald Trump, Mar-a-Lago Club and others regarding aircraft overflights above the Town of Palm Beach. Following is a brief history of past litigation between the parties:

- **1995 Lawsuit** - In September 1995, Donald Trump and Mar-a-Lago Club filed suit in state court against Palm Beach County and Bruce Pelly, individually. Like the latest lawsuit, the 1995 suit sought damages and injunctive relief based on theories of nuisance, trespass and inverse condemnation. The suit also included claims for fraud and promissory estoppel.
 - This lawsuit was settled in 1996. In the settlement, the County agreed to study aircraft departure procedures and to work with the FAA on those procedures. The County agreed to continue to support the “fanning” of departure routes for the noisiest “stage 2” jet aircraft (almost none of which exist today).
 - The plaintiffs, Donald Trump and Mar-a-Lago, agreed not to support or participate in litigation in the future against the County. The entities that were parties to that litigation were not exactly the same as in the latest lawsuit but it is believed that they are all related.
 - Donald Trump did not receive the right to lease County land for a golf course as part of this litigation. The County lease of property to Trump for operation of the golf course was a separate transaction and was not part of this litigation. In addition, Trump did not receive any compensation as a result of the litigation.
- **1998 Lawsuit** - The Palm Beach Neighborhood Association filed a lawsuit in 1998 with claims similar to those in the 1995 litigation. The plaintiffs voluntarily dismissed the case after the County won a key ruling that the plaintiffs needed to prove that their homes had actually decreased in value in order to prevail on their claims.
- **2010 Lawsuit** - In July 2010, Donald Trump and Mar-a-Lago filed suit in state court against Palm Beach County and Bruce Pelly, individually. Like the latest lawsuit, the complaint sought injunctive relief for alleged nuisance and trespass claims, as well as damages for inverse condemnation. The suit also alleged that Bruce Pelly engaged in intentional battery against Mar-a-Lago and Trump, by virtue of aircraft overflights. The lawsuit was dismissed without prejudice by the Court upon Defendants’ motion and re-filed later in 2010. The litigation was voluntarily dismissed by Trump approximately nine months later.

**AGREEMENT BETWEEN PALM BEACH COUNTY
AND KAPLAN, KIRSCH AND ROCKWELL LLP FOR LEGAL SERVICES**

THIS AGREEMENT FOR LEGAL SERVICES (this "Agreement") is made and entered into on this _____ day of _____, 2015 by and between Palm Beach County, a political subdivision of the State of Florida, hereinafter referred to as "COUNTY", and Kaplan Kirsch and Rockwell LLP, hereinafter referred to as "ATTORNEY".

WITNESSETH:

WHEREAS, COUNTY desires to retain the Legal Services of ATTORNEY for purposes of assisting the County Attorney in complex airport matters requiring special expertise; and

WHEREAS, ATTORNEY desires to provide Legal Services to COUNTY as requested by the County Attorney.

NOW, THEREFORE, in consideration of the mutual covenants and agreements expressed herein the parties agree as follows:

1. COUNTY agrees to retain ATTORNEY, on an as needed basis, for advice, representation, and assistance to County Attorney on various legal matters including, but not limited to, defense of COUNTY in a case captioned Mar-a-Lago, LLC v. Palm Beach County, Florida, (Case No. 50 2015 CA 000086 XXXX MB AA), and, services in which an expert aviation legal consultant is deemed necessary by the County Attorney, hereinafter referred to as "Legal Services". ATTORNEY shall perform the Legal Services as may be requested by the County Attorney or her designee.

The lawyer primarily handling this matter on behalf of ATTORNEY is Peter Kirsch, Esq., who will be assisted by other partners and associates as needed including John Putnam and W. Eric Pilsk.

When practicable and consistent with ATTORNEY's professional obligations, ATTORNEY shall coordinate with and give direction to the County Attorney and/or her designees, so that the County Attorney can provide routine legal services in connection with the case as a cost-savings measure. Examples of routine legal services that may be provided by the County Attorney and/or her designee under the coordination and direction of ATTORNEY include but are not limited, routine appearances at motion hearings, drafting discovery requests, reviewing discovery responses, taking/defending depositions, routine legal research, and the development of hearing exhibits.

2. COUNTY agrees to pay ATTORNEY for the Legal Services rendered on a per hour basis as set forth in Exhibit "A" in the total amount not to exceed THREE HUNDRED FIFTY THOUSAND DOLLARS AND NO CENTS (\$350,000.00). Monthly bills shall be submitted by ATTORNEY to the County Attorney's office for review and approval prior to payment. Each item shall be set forth separately, specifically describing the work performed, and reflecting the actual time spent on each such matter. ATTORNEY agrees to bill COUNTY for work performed in tenth of an hour increments. ATTORNEY shall notify the COUNTY when the billable fees and costs reach ninety (90%) percent of the not-to-exceed amount provided for herein. Notification shall be made as soon as is practicable and prior to the next monthly invoice.

3. (a) COUNTY also agrees to reimburse ATTORNEY for any reasonable and

ordinary expenses and costs incurred during the course of performing the Legal Services, provided that COUNTY has approved all such expenses and costs prior to the time that such expenses and costs are incurred. The expenses and costs may include, but are not limited to, out-of-pocket expenses for express mail, computerized research, word processing charges, postage and photocopying. Court filing fees and costs, witness fees, and previously approved travel shall be itemized and invoiced separately. Total expenses and costs reimbursed under this section shall not exceed THIRTY THOUSAND DOLLARS AND NO CENTS (\$30,000.00).

(b) All requests for payment of expenses eligible for reimbursement under this Agreement shall include copies of paid receipts, invoices, or other documentation acceptable to the Palm Beach County Finance Department. Such documentation shall be sufficient to establish that the expenses were actually incurred and necessary in the performance of the Legal Services. Photocopy charges shall describe the documents, purpose of duplication, and rate charged. Any out-of-county and related travel, per diem, mileage, meals, or lodging expenses which may be reimbursable under the terms of this Agreement shall be approved by the County Attorney's Office, in advance, and shall be paid in accordance with the rates and conditions set forth in Section 112.061, Florida Statutes and all applicable policies and procedures established by the Board of County Commissioners.

(c) ATTORNEY shall maintain adequate records to justify all charges, expenses, and costs incurred in performing the Legal Services for at least three (3) years after termination of this Agreement. COUNTY shall have access to such books, records and documents as required in this subparagraph for the purpose of inspection and/or audit during normal business hours, at COUNTY's expense, upon five (5) days written notice.

4. This Agreement may be terminated by COUNTY upon written notice to ATTORNEY, and termination shall become effective upon receipt of the notice. This Agreement may be terminated by ATTORNEY upon sixty (60) days written notice to COUNTY so long as such termination is consistent with ATTORNEY's professional obligations. Upon termination by either party, ATTORNEY shall transfer all work in progress, completed work, and other materials related to the Legal Services to COUNTY.

5. (a) ATTORNEY shall provide periodic status reports, either orally or in writing, as requested by the County Attorney or her designee.

(b) ATTORNEY shall deliver to the County Attorney's Office for approval and acceptance, and before being eligible for final payment of any amounts due, all documents and materials prepared by and for COUNTY in the course of providing the Legal Services.

(c) All written and oral information not in the public domain or not previously known, and all information and data obtained, developed, or supplied by COUNTY or at its expense shall be kept confidential by ATTORNEY and shall not be disclosed to any other party, directly or indirectly, without COUNTY's prior written consent unless required by an order issued by a court or like authority of lawful jurisdiction. All drawings, maps and sketches, and other data developed or purchased under this Agreement or at COUNTY's expense shall be and remain COUNTY's property and may be reproduced and reused solely at the discretion of COUNTY.

(d) ATTORNEY shall comply with the provisions of Chapter 119, Florida Statutes (Public Records Law).

6. ATTORNEY shall maintain during the term of this Agreement, standard Professional Liability Insurance with limits not less than One Million Dollars (\$1,000,000.00).

each occurrence with a maximum deductible of Fifty Thousand Dollars (\$50,000.00). A Certificate of Insurance, satisfactory to COUNTY, evidencing such coverage shall be furnished to COUNTY immediately upon execution of this Agreement, with complete copy of such policy to be furnished upon COUNTY's request. Such certificates of insurance will provide COUNTY with thirty (30) days prior written notice of any cancellation or non-renewal.

7. ATTORNEY shall indemnify, hold harmless and defend COUNTY, its agents, servants, and employees from and against any and all claims, liability, losses and/or causes of actions which may arise by virtue of any intentional or negligent act or omission of ATTORNEY or any agent, member, partner, associate or employee thereof in the performance of the Legal Services.

8. ATTORNEY represents that it has, or will secure at its own expense, all necessary personnel required to perform the Legal Services as required herein. Such personnel shall not be employees of or have any contractual relationship with COUNTY. The Legal Services shall be performed by ATTORNEY or under its supervision, and all personnel engaged in performing the Legal Services shall be fully qualified and, if required, authorized or permitted under state and local law to perform such services. ATTORNEY warrants that the Legal Services shall be performed by skilled and competent personnel to the highest professional standards.

9. ATTORNEY's signature on this Agreement shall act as the execution of a truth-in-negotiation certificate certifying that the wage rates and costs used to determine the compensation provided for in this Agreement are accurate, complete and current as of the date of this Agreement.

10. (a) ATTORNEY represents that it presently has no interest and shall

acquire no interest, either direct or indirect, which would conflict in any manner with the performance of the Legal Services, as provided in the standards set forth in Part III of Chapter 112, Florida Statutes. ATTORNEY further represents that no person having such a conflicting interest shall be employed by ATTORNEY to perform the Legal Services.

(b) ATTORNEY shall promptly notify COUNTY in writing of all potential conflicts of interest for any prospective business association, interest or other circumstance which may influence or appear to influence ATTORNEY'S judgment or quality of the Legal Services. The notice shall identify the prospective business association, interest or circumstance and the nature of work that ATTORNEY wants to undertake and request COUNTY's opinion as to whether the association, interest or circumstance would, in the opinion of COUNTY, constitute a conflict of interest if entered into by ATTORNEY. COUNTY agrees to notify ATTORNEY of its opinion within thirty (30) days of receipt of notification by ATTORNEY. If, in the opinion of COUNTY, the prospective business association, interest or circumstance would not constitute a conflict of interest by ATTORNEY, COUNTY shall so state in its opinion, and the association, interest, or circumstance shall not be deemed to be a conflict of interest with respect to the Legal Services. ATTORNEY further agrees to comply with Palm Beach County PPM #CW-0-052 regarding outside counsel conflicts of interest.

11. ATTORNEY is, and shall be, in the performance of the Legal Services an independent contractor and not an employee of COUNTY. All persons engaged in the Legal Services performed by ATTORNEY pursuant to this Agreement shall at all times, and in all places, be subject to ATTORNEY'S sole discretion, supervision, and control. ATTORNEY shall exercise control over the means and manner in which it and its employees perform the work. ATTORNEY does not have the power or authority to bind

COUNTY in any promise, agreement or representation other than as specifically provided for in this Agreement.

12. ATTORNEY warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for ATTORNEY, to solicit or secure this Agreement and that it has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for ATTORNEY, any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from the award or making of this Agreement.

13. ATTORNEY warrants and represents to COUNTY that all of its employees are treated equally during employment without regard to race, color, national origin, religion, ancestry, sex, age, familial status, marital status, sexual orientation, gender identity and expression, disability, or genetic information. ATTORNEY has submitted to COUNTY a copy of its non-discrimination policy, which is consistent with the above, as contained in Resolution R-2014-1421, as amended, or in the alternative, if ATTORNEY does not have a written non-discrimination policy, it has acknowledged through a signed statement provided to COUNTY affirming their non-discrimination policy conforms to R-2014-1421, as amended.

14. This Agreement shall be governed by the laws of the State of Florida. Any and all legal action necessary to enforce this Agreement shall be originally filed and later held in Palm Beach County. No remedy herein conferred upon the parties is intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity, by statute or otherwise. No single or partial exercise by any party of any right, power, or remedy hereunder shall preclude any other further exercise thereof.

15. All written notices required in this Agreement shall be sent by certified mail, return receipt requested. If sent to COUNTY, the notice shall be mailed to:

County Attorney
Palm Beach County
301 North Olive Avenue, Suite 601
West Palm Beach, Florida 33401
ATTN: James C. Mize, Jr., Esq.

If sent to ATTORNEY, the notice shall be mailed to:

Kaplan Kirsch & Rockwell LLP
1675 Broadway, Suite 2300
Denver, Colorado 80202
ATTN: Peter Kirsch, Esq.

16. The foregoing terms and conditions constitute the entire agreement between the parties hereto and any representation not contained herein shall be null and void and of no force or effect. Further, this Agreement may be amended only in writing upon mutual consent of the parties hereto.

17. All exhibits attached hereto and referenced herein shall be deemed to be incorporated into this Agreement by reference.

18. No provision of this Agreement is intended to, or shall be construed to, create any third party beneficiary or to provide any rights to any person or entity not a party to this Agreement, including, but not limited to, any citizen or employees of County and/or ATTORNEY.

19. Palm Beach County has established the Office of the Inspector General in Palm Beach County Code, Section 2-421 - 2-440, as may be amended. The Inspector General's authority includes but is not limited to the power to review past, present and proposed COUNTY contracts, transactions, accounts and records, to require the production of records, and to audit, investigate, monitor, and inspect the activities of ATTORNEY, its officers, agents, employees and lobbyists in order to ensure compliance

with contract requirements and detect corruption and fraud. Failure to cooperate with the Inspector General or interfering with or impeding any investigation shall be in violation of Palm Beach County Code, Section 2-421 - 2-440, and punished pursuant to Section 125.69, Florida Statutes, in the same manner as a second degree misdemeanor.

20. This Agreement shall be effective as of and shall apply to legal services performed after, January 9, 2015, and shall terminate two (2) years from the effective date of this Agreement. At the sole option of COUNTY, this Agreement may be renewed by COUNTY upon no less than thirty (30) days written notice to ATTORNEY prior to the then current term for up to two (2) additional two (2) year periods upon the same price, terms and conditions as set forth herein.

(Remainder of page intentionally left blank)

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement on

the day and year first above written.

ATTEST:
SHARON R. BOCK
Clerk & Comptroller

PALM BEACH COUNTY, FLORIDA, BY ITS
BOARD OF COUNTY COMMISSIONERS

Deputy Clerk

Shelley Vana, Mayor

APPROVED AS TO FORM &
LEGAL SUFFICIENCY

Shirley Taylor Petruck
County Attorney

WITNESSES:

ATTORNEY:
Kaplan Kirsch & Rockwell LLP

By: *Jennifer Fox*
Signature
Jennifer Fox
Print Name

By: *Peter Kirsch*
Peter Kirsch, Esq.

By: *Catherine M. van Heuven*
Signature
Catherine M. van Heuven
Print Name

Partner
Title

EXHIBIT A

Peter Kirsch	\$425.00
John Putnam	\$375.00
W. Eric Pilsk	\$375.00
Associates	\$250-275.00
Law Clerks	\$115.00

County Attorney
BUDGET AVAILABILITY STATEMENT
Airports Department

REQUEST DATE: 2/01/15 **REQUESTED BY:** County Attorney **PHONE:**
FAX:

ORIGINAL CONTRACT/ANNUAL AMOUNT: \$380,000
REQUESTED AMOUNT: \$380,000

CONSULTANT/CONTRACTOR: Kaplan Kirsh and Rockwell

PROVIDE A BRIEF STATEMENT OF THE SCOPE OF SERVICES TO BE PROVIDED BY THE CONSULTANT/CONTRACTOR:

Legal representation

CONSTRUCTION:
PROFESSIONAL SERVICES:
 Kaplan Kirsh Rockwell \$380,000
STAFF COSTS:
MISC.:
TOTAL: \$380,000

BUDGET ACCOUNT NUMBER (IF KNOWN)

FUND: 4100 **DEPT:** 120 **UNIT:** 1110 **OBJ:** 3125

BAS APPROVED BY: CM Sanni **DATE:** 2/6/15

Attachment # 2